No. 85-4 (D)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OREST V. MARESCA, SIDNEY ROSEN, JOSE RAMOS-LOPEZ, MICHAEL WOLLIN, and WILLIAM C. BRENNAN,

Appellants,

vs.

MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK, EDWARD V. REGAN, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, PHYLLIS GANGEL JACOB, ANTONIO I. BRANDVEEN, CAROL AARONOFF, ROBERT SILVERSON, RICHARD GUGLIATTO, PHILIP C. MODESTO, SEYMOUR GERSCHWER, SIDNEY B. LEVITT, CHARLES RAMOS, WILSON GRAVES AND ENRIQUE CALDERON,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION BY APPELLEES MARIO CUOMO, EDWARD V. REGAN AND NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM TO DISMISS OR AFFIRM

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Questions Presented

1. Whether Article VI, Section 25(b) of the New York State Constitution and Section 23 of the New York State Judiciary Law, in providing for expiration of the term of office of most State judges on the last day of December in the year in which they reach the age of seventy, are reasonably related to a legitimate State purpose and thus within the due process and equal protection clauses of the Fourteenth Amendment?

2. Whether Article VI, Section 25(b) of the New York State Constitution, in providing that judges of the State Court of Appeals and justices of the State Supreme Court may be certified to perform the duties of a State Supreme Court justice until the age of seventy-six, is reasonably related to a legitimate State purpose and thus within the equal protection clause of the Fourteenth Amendment?

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Opinions Below

The opinion of the New York State Court of Appeals is reported at 64 N.Y.2d 242, 48 N.Y.S.2d 724 (1984). The opinion of the

New York State Supreme Court, Appellate Division, First Department, is reported at 105 A.D.2d 193, 483 N.Y.S.2d 690 (1st Dep't 1984). The opinion of the New York State Supreme Court, Special Term, Part I, New York County, is reported in *The New York Law Journal*, Dec. 20, 1984, at p. 12, col. 6. These opinions are set forth at J. 1a, 14a and 28a, respectively.*

Statement Of The Case

Appellants are four judges of the Civil Court of the City of New York and one justice of the Supreme Court of the State of New York. They contend that Article VI, Section 25(b) of the New York Constitution and Section 23 of the New York Judiciary Law violate the equal protection and due process clauses of the Fourteenth Amendment.** In effect, these provisions establish a retirement age of seventy for virtually all State judges. However, Article VI of the State Constitution and Sections 114 and 115 of the Judiciary Law provide that judges of the State's highest court, the Court of Appeals, and justices of the court with the broadest jurisdiction in the State, the Supreme Court, may be certified for continued service on the bench until age seventy-six.

Article VI, Section 25(b) of the State Constitution, which took effect September 1, 1962, was an early step in the reorganization and unification of the State court system. It continued in effect a constitutionally mandated judicial retirement age that for at least certain State court judges has appeared in every State Constitution since the first New York Constitution of 1777. That Constitution provided, in Article XXVI, that the judges of the State Supreme Court and the first judge of every county court had to relinquish office at age sixty.

Over time, various constitutional amendments have been proposed which would have raised the mandatory retirement age

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* References in the form J.____ are to appellants' Jurisdictional Statement.

** The challenged provisions are set forth at J. 6-7.

to seventy-five, exempted Court of Appeals judges from mandatory retirement, or eliminated the provision entirely, but none of these proposals was ever approved by the Legislature and submitted to the public. *See, e.g.*, Record of the 1983 New York State Constitutional Convention, Vo. II, pp. 531-534. To the contrary, concern over the effects of advancing age on judicial performance has been continually voiced both in the Legislature and at successive constitutional conventions. *See, e.g.*, Record of the 1967 New York State Constitutional Convention, IV-845, 858, 887-889, 947-948. Thus, as the State Court of Appeals commented early on, the State Constitution reflects "the apprehension that, during [a] long [judicial] term, the natural decay of the powers of the man might at times leave upon the bench an inefficient judge." *People v. Gardner*, 45 N.Y. 812, 819 (1871). Addressing that apprehension, the State Constitution, "instead of prohibiting the election [to long judicial terms] of those who were too old to serve the full period, [limits] the term in such cases to the length of time they could serve," *i.e.*, to age seventy. *People v. Brundage*, 78 N.Y. 403, 406 (1879).

Article VI, Section 25(b) also permits mandatorily retired judges of the State Court of Appeals and justices of the State Supreme Court, but not judges of the Civil Court, to apply for certification to perform the duties of a Supreme Court justice for as many as three two-year terms, but in any event not beyond age seventy-six. Together with the new Sections 114 and 115 of the Judiciary Law,* Article VI, Section 25(b) thereby replaced the official referee, an anomalous position abolished in the reorganization of the courts, and at the same time sought to make better use of the talents of former Court of Appeals judges and Supreme Court justices. Plan of the Temporary Commission on the Courts, July 2, 1956, p. 57.

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* Sections 114 and 115 of the Judiciary Law, both added by L. 1962, c. 704, § 2, provide that State Court of Appeals judges (§ 114) and State Supreme Court justices (§ 115) retired pursuant to Article VI, Section 25(b) of the State Constitution may be certified for continued service upon findings that they have the requisite mental and physical capacity and that their services are necessary to expedite the business of the State Supreme Court.

Appellants brought this action seeking a declaration that Article VI, Section 25(b), and Judiciary Law, Section 23, violate the equal protection and due process clauses of the Fourteenth Amendment. The State Supreme Court, at Special Term, granted appellants' motion for preliminary injunctive relief, but on appeal, the Appellate Division, First Department, unanimously reversed and dismissed the complaint. In the order which appellants seek to appeal to this Court, the State Court of Appeals unanimously determined that Article VI, Section 25(b), and Judiciary Law, Section 23, are reasonably related to a legitimate State purpose and, accordingly, modified the Appellate Division's order to declare these provisions constitutional.

Argument

A. *Appellants' Jurisdictional Statement Is Untimely*

The Rules of this Court provide that an appellant must docket a case by *inter alia* filing a jurisdictional statement with proof of service within ninety days after entry of the judgment appealed from. U.S. Sup. Ct. Rules, Rule 12.1, 12.3. The remittitur of the New York State Court of Appeals was entered in the Office of the County Clerk, New York County, on January 8, 1985. Appendix to Appellees' Motion To Dismiss or Affirm, *infra*, at A-1. Accordingly, appellants were required to file their Jurisdictional Statement on or before April 8, 1985.

Appellants' Jurisdictional Statement was not filed, however, until July 3, 1985. It is therefore untimely by almost three months. Appellants never moved for an enlargement of time pursuant to Rule 12.2 of the Rules of this Court, and they fail to offer a reasonable excuse for their untimely docketing. Although appellants' counsel of record disclaims awareness of or responsibility for this delay, J. 3-5, he has been appellants' attorney throughout this action, and he is ultimately responsible for compliance with the Rules of this Court. "Counsel who enter their appearance...must understand that the court will hold them responsible for all that such an entry implies until they relieve themselves from the obligation they assume, by substitution or otherwise." *Alvord v. United States*, 99 U.S. 593 (1878). Therefore, the appeal should be dismissed as untimely docketed.

B. *This Case Raises No Substantial Federal Questions*

According to appellants this case raises two substantial federal questions which warrant review by this Court. The first concerns age discrimination claims of judges, J. 15, and the second concerns the level of scrutiny to be applied under the Fourteenth Amendment to age-based classifications, *id.*

We submit that neither is a substantial federal question meriting plenary review. The mere fact that redress is being sought by judges and not janitors does not render the questions in the case substantial. Moreover, on July 1, 1985, this Court reaffirmed the rule that differential treatment based on age is subject to neither "strict" nor "heightened" scrutiny in determining compliance with the equal protection clause of the Fourteenth Amendment. *Cleburne v. Cleburne Living Center*, ____U.S.____, 53 U.S.L.W. 5022, 5024 (1985); *see also, Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Thus, contrary to appellants' suggestion, there is no need to "clarify for the nation the question of ... whether age is now a suspect class." J. 15.

Appellants argue that Article VI, Section 25(b) of the State Constitution and Section 23 of the Judiciary Law deny them equal protection in three ways:

(1) by unreasonably discriminating between judges over the age of seventy and judges under the age of seventy without regard to individual competence;

(2) by unreasonably discriminating between judges and all other elected and appointed public officials in the State and its political subdivisions who are not subject to a mandatory retirement age;

(3) by unreasonably discriminating between judges of the Civil Court and justices of the State Supreme Court, since the latter, but not the former, may apply for certification to perform the functions of a State Supreme Court justice for successive two-year terms until age seventy-six.

It is clear from appellants' recitation of the decision by the New York Court of Appeals, J. 10-15, that all of these claims were addressed and properly rejected by that court, just as virtually identical claims have been uniformly rejected by other appellate courts. *See, e.g., Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), cert denied, 444 U.S. 906 (1979); *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975).

The State Court of Appeals confirmed that the challenged age limitation is rationally related to the promotion of a number of legitimate State interests, J. 9a. The Court also confirmed the existence of a rational basis for restricting post-retirement service in the State Supreme Court — a court of "broad, general jurisdiction" and "State-wide reach" — to former judges of the State's highest two courts, J. 10a. Indeed, the wisdom of New York's decision to address only the problems of State Supreme Court, and the "mathematical nicety" of that decision, are not appropriate matters for the courts to consider. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).*

The same reasons that defeat appellants' equal protection claims also defeat their claim under the due process clause that the challenged provisions create an "irrebuttable presumption" that persons over seventy cannot perform their judicial duties. The irrebuttable presumption doctrine has no application to cases of this kind. This Court did not apply it in *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1974), *dismissing appeal from* 454 Pa. 129, 309 A.2d 801 (1973) (upholding constitutionality of state statute mandating retirement at age sixty for Pennsylvania State Police) or *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'g* 383 F. Supp. 933 (D.D.C. 1974) (3-judge court) (upholding constitutionality of Federal Employee Mandatory Retirement Law [mandating retirement at age seventy]). Such summary affirmances and dismissals

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* Appellants lack standing to raise any claims on behalf of individuals who voted for them. No voter is a party to this action. Such claims, moreover, are plainly insubstantial, for under New York's constitutional and statutory scheme, appellants' terms were openly delimited from the outset by the mandatory retirement provisions they now contest.

for want of a substantial federal question are rulings on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

In short, the doctrine of irrebuttable presumptions is merely "coextensive with the equal protection clause." *Trafelet v. Thompson*, 594 F. 2d at 630. If "a classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption." *Palmer v. Ticcione*, 576 F. 2d 459, 463 (2d Cir. 1978). This appeal, therefore, presents no substantial federal questions for this Court's determination and should be dismissed.

CONCLUSION

The appeal should be dismissed or in the alternative the order of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
July 31, 1985

Respectfully submitted,
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Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 698

OREST V. MARESCA, et al.,

Appellants,

v.

MARIO CUOMO, Governor &c., et al.,

Respondents.

The appellant(s) in the above entitled appeal appeared by Giamo & Vreeburg; *the respondent(s) appeared by* Hon. Robert Abrams, Attorney General, State of New York; Fried, Frank, Harris, Shriver & Jacobson, Esqs.; Michael Colodner, Esq.; Nicholas J. Miglino, Esq.; Gaffin & Mayo, P.C.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to respondents, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Jasen. Judges Jones, Wachtler, Meyer, Simons and Kaye concur. Chief Judge Cooke took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,

there to be proceeded upon according to law.

I certify that the proceeding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ _____
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 31, 1984.

FILED JANUARY 8, 1985
COUNTY CLERK'S OFFICE, NEW YORK